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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/614,532	07/07/2003	David H. McFadden	54330/322597	9062

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EXAMINER

COCKS, JOSIAH C

ART UNIT PAPER NUMBER

3749

DATE MAILED: 04/07/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/614,532

Applicant(s)

MCFADDEN, DAVID H.

Examiner

Josiah Cocks

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on RCE and amendment filed 3/22/2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 95-109 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 95-109 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination ("RCE") under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's RCE submission and accompanying amendment filed on 3/22/2006 have been entered.

Terminal Disclaimer

2. The terminal disclaimer filed on 3/22/2006 disclaiming the terminal portion of any patent granted on this application that would extend beyond the expiration date of U.S. Patent No. 6,874,495 has been reviewed and is NOT accepted.

An attorney or agent, **not of record**, is not authorized to sign a terminal disclaimer in the capacity as an attorney or agent acting in a representative capacity as provided by 37 CFR 1.34

(a). See 37 CFR 1.321(b) and/or (c). Per the Revocation of Prior Powers of Attorney filed 12/14/2005, the attorney or agent, David Bolton, who signed the Terminal Disclaimer is no longer of record.

The person who signed the terminal disclaimer is not recognized as an officer of the assignee, and he/she has not been established as being authorized to act on behalf of the assignee. See MPEP § 324. It would be acceptable for a person, other than a recognized officer, to sign a

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terminal disclaimer, provided the record for the application includes a statement that the person is empowered to sign terminal disclaimers and/or act on behalf of the organization.

Accordingly, a new terminal disclaimer which includes the above empowerment statement will be considered to be signed by an appropriate official of the assignee. A separately filed paper referencing the previously filed terminal disclaimer and containing a proper empowerment statement would also be acceptable.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 95-99, 101, 102, and 104-109 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 4,327,279 to Guibert ("Guibert") (cited by applicant).

Guibert discloses an invention substantially as described in applicant's claims 95-99, 101, 102, and 104-109. In particular, Guibert teaches a system and method of speed heating a food product with gas comprising the steps of providing a housing (10) defining a heating chamber (area within compartment 14), and providing at least three means (see Fig. 3 and holes of 14a, 14b, and 14c) for directing gas into the heating chamber. Heating means in the form of heaters (18 and 19) and a blower (15) and motor (16) are provided to selectively control a flow of air through the holes in compartment (14) to propel the air at high velocity causing collision in order

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to rapidly heat food products placed therein (see col. 6, lines 21-56 and Fig. 2). Guibert also discloses conduits for directing gas to and from the chamber (As1 and As2, Fig. 2).

In regard to the recitation that the method relates to speed “cooking” a food product, the examiner does note that Guibert desired only to heat the food products contained within chamber and not “cook” them. However, the purpose for not cooking these products is so that they may be refrozen for later use (see col. 5, lines 29-37). Further, Guibert provides for the interrupted application of heat in order to preventing cooking of the food products and acknowledges that cooking would result if the heat source is not interrupted (see col. 6, line 65 through col. 7, line 17). It has been held that the elimination of a step and its function is obvious if the function is not desired. See MPEP 2144.04(II)(A). The examiner considers that it would be obvious to a person of ordinary skill in the art that were one to eliminate the heat interruption described in Guibert if one is not concerned with merely heating a food product to allow it to be refrozen. Accordingly, the person of ordinary skill would recognize that the method and system of Guibert would then be provided for cooking the food product.

In regard to the limitation of an “exposed surface of the food product,” (claims 95 and 109) applicant does not define how the surface of the food product must be exposed.

Accordingly, this limitation is at least met by a food product that is exposed to heat. The food products arranged in the tray (12) of Guibert clearly included surfaces that are exposed to the heat provided by the flow of hot air and thus clearly meet this limitation of applicant’s claims.

Further in regard to the “exposed surface...” limitation as appears in the system claim 109, a food product is not positively recited in the claim. Instead this claim is merely limiting to the structure of the gas directing means, which is configured to direct gas in the manner recited

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to the food product. As noted above, the gas directing means of Guibert are considered to configured in the same manner as recited by applicant and would therefore function to direct gas to any exposed surface of a food product placed in the oven.

Alternatively, the food tray (12) of Guibert is clearly disclosed as having a removable lid (12A). The purpose of this lid is to seal the contents of tray during the heating process (see col. 5, lines 38-40). Applicant is unconcerned with sealing the food product during heating and accordingly does not include any lid over the food product. However, it has been held that the elimination of a step or element and its function is obvious if the function is not desired. See MPEP 2144.04(II)(A). In this case, a person of ordinary skill in the art unconcerned with sealing the contents of the tray would reasonably consider it obvious to therefore remove the lid and its associated sealing function during heating. Therefore, the recitation that the food product has an exposed surface does not patentably distinguish applicant's invention over Guibert.

In regard to claims 104-106, Guibert clearly discloses that the gas directed by blower (15) is propelled at high velocity (see Abstract). To have selected a specific velocity, such as that recited in claims 104-106, would be simply a matter of optimizing the prior art disclosure of high velocity and is not regarded as patentably distinct. See MPEP 2144.05 (II)(A).

5. Claims 100 and 103 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,060,701 to McKee et al. ("McKee").

Guibert teaches all the limitations of claims 100 and 103 except for a damper means and possibly for a variable speed motor for the blower.

McKee teaches a speed cooking/heating oven in the same field of endeavor as Guibert. In McKee, it is recognized that a conduit (20) providing for the circulation of air (i.e. gas, see col. 3, lines 40-42) may include a damper to modify the air flow through the conduit. McKee also discloses the use of a variable speed blower but notes that a damper also desirably serves to provide a similar effect as a variable speed blower when a fixed speed blower is employed (see col. 5, lines 55-59).

Therefore, in regard to claims 100 and 103, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to modify the oven of Guibert to incorporate the damper and variable speed blower as taught in McKee to desirably control the volume of air flow to provide the desired thermal energy for the cooking chamber (see McKee, col. 5, lines 50-59).

Double Patenting

6. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground

provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

7. Claim 109 is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of U.S. Patent No. 6,874,495 (“495 patent”).

Although the conflicting claims are not identical, they are not patentably distinct from each other because though claim 109 is broader in scope than claim 1 of the ‘495 patent it is claiming the same invention.

8. The prior Office action included double patenting rejections on the basis of “co-pending Application No. 10/614,532.” However, as this application is Application No. 10/614,532, the statement of the grounds of the double patenting rejection in the prior Office action is clearly in error. As best can be determined, it appears the examiner intended to reference applicant’s copending Application No. 10/614,710. However, review of the claims of both this application and copending Application No. 10/614,710 reveals no issues of double patenting between them. Accordingly, the prior double patenting rejection on the basis of “co-pending Application No. 10/614,532” is withdrawn.

Response to Arguments

9. Applicant's arguments filed 3/22/2006 have been fully considered but they are not persuasive.

Applicant argues that by amending the claims to recite that the food product has an "exposed surface" renders applicant's claims free of Guibert. For the reasons noted in the sections above, this argument is not persuasive.

Applicant also argues that Guibert does not show a method of cooking a food product. This argument is not persuasive. As has been noted, Guibert clearly discloses that the food products are heated and expressly notes that cooking would result were the heat supplied to the oven to be uninterrupted (see Guibert, at least col. 6, line 65 through col. 7, line 17). Accordingly, a person of ordinary skill in the art would reasonably understand that were cooking of the food product desired one would eliminate the heat interruption described in Guibert.

Applicant also argues that Guibert does not disclose colliding gas streams as recited in applicant's claims. However, far from "teaching away" from such colliding as alleged by applicant, Guibert clearly discloses that the gas/air streams passing through the angled portions of the compartments walls (14) are moving at high velocity and around the food product trays (12) (see Guibert, at least col. 6, lines 42-56). In circulating around the trays (12) the heat air flows would necessarily come into contact (i.e. collide) with one another in order to perform their intended function of rapidly transferring heat to the food product. Applicant points to the illustrated flow arrows of Fig. 2 of Guibert as some form of evidence that the flows do not collide. However, the examiner notes that at the very least these arrows indicate that the flow passing from panel (14b) would collide with the flow from panel (14c) in order to jointly exit the

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chamber formed by compartment (14) at the end of panel (14f) (as shown by the single arrow).

Likewise, at the very least the flows from panel (14b) and panel (14a) would contact in order to exit at the end of panel (14e). Accordingly, this argument is not found persuasive.

Applicant appears to argue that McKee also does not disclose the colliding air flows as recited in applicant's claims. However, as noted above, such air flows are present in Guibert. McKee has been cited to show a variable speed motor/blower in an oven similar to that of Guibert. As applicant does not dispute the presence of such motor/blower, McKee is properly considered to show that for which it has been cited.

For the reasons noted, applicant's claims do not distinguish over the prior art of record.

Conclusion

10. This action is made non-final. A THREE (3) MONTH shortened statutory period for reply has been set. Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.


11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner Josiah Cocks whose telephone number is (571) 272-4874. The examiner can normally be reached on weekdays from 8:00 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ehud Gartenberg, can be reached at (571) 272-4828. The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

jcc
March 30, 2006



JOSIAH COCKS
PRIMARY EXAMINER
ART UNIT 3749